

January 3, 2005

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON REASONABLE USE EXCEPTION APPEAL

SUBJECT: Department of Development and Environmental Services File No. **L04SAX04**

SEASPECT, INC.

Reasonable Use Exception Appeal

Location: 13677 – 62nd Avenue Northeast, Kirkland

Appellant: SeaSpect, Inc., *represented by*
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by

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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:
Department's Final Recommendation:
Examiner's Decision:

Deny appeal
Deny appeal
Grant appeal, subject to conditions

EXAMINER PROCEEDINGS:

Hearing Opened:

December 10, 2004

Hearing Closed:
2004

December 10,

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS OF FACT:

1. On August 23, 2004 the King County Department of Development and Environmental Services issued a decision denying SeaSpect, Inc.'s request for a reasonable exception encompassing 4,996 square feet of impervious surfaces on a 13,068 square foot parcel. It is uncontested that more than 90% of the parcel is occupied by a Class 3 wetland and some degree of exception to or waiver from sensitive areas requirements is necessary to construct any residence on this R4-zoned property. DDES staff rejected SeaSpect's reasonable use exception application because the total area of site disturbance proposed exceeded a 3,000 square foot limit stated in Public Rule 21A-24-022 and therefore was not the minimum necessary to provide relief to the Applicant. SeaSpect filed a timely appeal of the reasonable use exception denial.
2. SeaSpect had previously requested from DDES a modification or waiver of wetland requirements pursuant to KCC 21A.24.075, which waiver request was denied by DDES on June 2, 2003 under file no. B00L0367. SeaSpect at that time attempted to appeal the waiver denial but this appeal was dismissed by the Hearing Examiner on the grounds of lack of jurisdiction. The Examiner's ruling was that the waiver did not qualify under KCC 20.20.020 as a type 2 decision and could only be appealed pursuant to KCC 21A.24.030 as an adjunct to another authorized appeal procedure. SeaSpect again raised the waiver denial as a part of the reasonable use exception appeal, and it was heard concurrently therewith.
3. This R4-zoned property is subject to a number of zoning development conditions, including a heron habitat protection area overlay, seasonal clearing restrictions and the Holmes Point site disturbance P-suffix conditions. This last requirement, condition NS-P23, is of particular importance because it places a limit on total building coverage and impervious surfaces for new development. For a lot exceeding 9,000 square feet in size the coverage limit under NS-P23 is 3,300 square feet plus 10% of the lot area in excess of 9,000 square feet. For the SeaSpect parcel, new development authorized by the Holmes Point site disturbance P-suffix condition is limited to a total of 3,707 square feet. This total may be increased by a further 10% if demonstrated necessary to provide additional parking or access to make a dwelling accessible for a mobility-impaired resident. (The record contains some prior correspondence between DDES and SeaSpect's representatives regarding application of the NS-P23 requirements; these preliminary discussions carry no weight in this proceeding.) Finally, the western frontage of the lot borders on Lake Washington and is subject to a 20-foot shoreline setback from the ordinary high water mark.
4. A former single-family residence on the property was destroyed by fire in 1989 and not rebuilt. Although only fragments of the original house foundation remain, SeaSpect's representatives have estimated that the former house footprint and surrounding development occupied 5,845

square feet. Surviving portions of the prior development that continue to have some degree of current viability are limited to a boathouse and dock on the waterfront and segments of the asphalt driveway which enters the property from the east. The SeaSpect property does not have road frontage on 62nd Avenue Northeast but is separated therefrom by two intervening parcels and obtains access through these parcels via an easement driveway.

5. The SeaSpect property slopes gently from east to west, with the only non-wetland portion of the site located adjacent to Lake Washington in a narrow area lying between two rockery walls. The wetland on the property is uphill from the non-wetland area. This fact, plus the topography of the area generally, the location of other residential developments uphill from the site, and the prior existence of a single-family residence on the property all suggest that the wetland hydrology for this property is at least in significant part of artificial origin. The August 23, 2004 DDES decision contains the following description:

“Hydrology: Adolfson Associates, Inc. performed a wetland evaluation in April 2002 and concluded the following: The on-site wetland is influenced primarily by precipitation and surface water runoff, although development higher in the drainage basin has likely had some affect [sic] on the hydrologic conditions of the wetland. Water from an artesian well to the east of the subject site has been placed in a pipe that flows down to the lake. An underground pipe on the site becomes clogged occasionally, resulting in surface water in places. At the time of the April 2002 wetland evaluation, surface water was present in places on the site. One inch of surface water observed in topographically low area near the south property boundary. In addition, surface water was present within the foundation of the house at a depth of less than one inch. It is estimated that surface water was present on less than one-tenth of the site at the time of delineation by Adolfson Associates. The presence of surface water and indicators of wetland hydrology in the plots may be due to side slope seepage, broken and/or malfunctioning pipes, and surface water runoff. Depending on the depth of the foundation, this structure may be impeding surface water flows.”

6. Photographs of the site taken in the late 1990's show a property overgrown with blackberries with a fairly robust stand young of cottonwood and alder on the uphill side. At least one larger conifer was also present. The wetland was illegally cleared in 2000, and the SeaSpect consultants have analyzed the wetland functions and values in the property's post-clearing state. Properly speaking, however, the wetland values and functions should be reviewed in the pre-clearing condition. At this earlier point it contained an emergent woodland but, due to its small size and surrounding urban development, would have provided little wildlife habitat function. Storm water detention and water quality improvement values would also be negligible because the site drains directly to Lake Washington. DDES has stipulated that the wetland does not perform any significant fisheries habitat functions.
7. Other than the zoning restrictions and setbacks noted above, the only development constraint of obvious importance on the site relates to its lack of road frontage. This requires site access across two other residential parcels via an easement driveway. The SeaSpect parcel is about 200 feet removed via a driveway from 62nd Avenue Northeast, and guests visiting the property do not have convenient access to on-street parking. This means that the on-site parking for the SeaSpect parcel must be sufficient to accommodate not only property residents but some amount of guest usage as well.

8. One of SeaSpect's appeal contentions is that the reasonable use standard must be interpreted in terms of the normal development expectations for a waterfront residential property on Lake Washington. The essential argument is that a modest house which would be acceptable on a less expensive property is not a reasonable use of a parcel that is worth more than a half-million dollars. SeaSpect has produced King County Assessor records for neighboring properties both to the north and south in an attempt to establish that the DDES 3,000 square-foot development limitation stated in its public rule is an unreasonable restraint as applied to this parcel. Looking at the data offered, it is difficult to draw any firm conclusions of the type requested by SeaSpect. Of the fourteen parcels surveyed only three are less than 18,000 square feet in area and some are greater than 30,000 square feet. Due to their larger size, they are capable of supporting larger developments. Even so, nearly half (six of them) are less than 3,000 square feet in footprint area.
9. SeaSpect has developed a conceptual mitigation plan that proposes mitigation to occur within a offsite sub-basin located on the eastern shore of Lake Washington at a one to one replacement ratio plus on-site landscaping consisting of native vegetation plantings.

CONCLUSIONS:

1. The DDES determination on a reasonable use exception application is categorized as a type 2 land use decision by KCC 20.20.020. KCC 20.24.080A requires the Hearing Examiner to conduct open record appeal hearings on type 2 land use decisions as well as upon other appeals prescribed by ordinance. KCC 21A.24.030 governs appeals of sensitive area waiver applications and provides that they "may be appealed according to and as part of the appeal procedure for the permit or approval involved". The waiver appeal therefore has been appended to the reasonable use exception appeal and is also subject to the open record hearing requirements of KCC 20.24.080.A. Both the reasonable use exception and the sensitive areas waiver appeals are considered *de novo* by the Hearing Examiner.
2. The reasonable use exception and waiver procedures are both limited to the alteration of sensitive areas requirements. They confer no authority to waive or modify zoning restrictions. The SeaSpect parcel is subject to the Holmes Point site disturbance P-suffix conditions stated at NS-P23. As applied to the Appellant's 13,068 square foot parcel, new residential development under authority of NS-P23 cannot exceed 3,707 square feet of impervious surface. The upper limit for which a reasonable use exception or sensitive area waiver could be granted for this parcel is therefore 3,707 square feet of impervious surface. It is illogical to suggest that a reasonable use of a property should exceed the zoning limitation applicable to all other similarly zoned properties.
3. The record documents an attempt by SeaSpect's representatives to exceed the 3,707 square foot zoning limitation by obtaining regulatory recognition of the old building footprint on the property established for the residence destroyed by fire in 1989. This argument is based on language contained in NS-P23 stating that "on a lot already developed, cleared or otherwise altered up to or in excess of the limit set forth above prior to the effective date of the application of this P-suffix condition, new impervious surfaces shall be limited to 5% of the area of the lot, not to exceed 750 square feet." SeaSpect contends that this language authorizes a current building envelope of approximately 5,845 square feet based on the prior residence, plus a 5% expansion.

This position is untenable. The old residence, if it were still in existence, would be a legal non-conforming structure with regard to current zoning regulations. KCC 21A.32.025 and .045

operate to terminate the legality of a destroyed non-conforming structure if a building permit for its reconstruction is not submitted within 12 months of its eradication. Therefore, any rights to reconstruct the non-conforming structure destroyed in 1989 have long been forfeited and cannot be revived through a back-door appeal to the P-suffix provision quoted above. As used in the P-suffix condition, the term “a lot already developed” can only mean a lot on which a legal non-conforming structure currently exists. For the SeaSpect parcel, the upper zoning limit for building coverage and impervious surfaces remains 3,707 square feet.

4. The reasonable use exception stated at KCC 21A.24.070.B may be granted where a variance cannot be obtained and the following criteria are met:
 - “a. the application of this chapter would deny all reasonable use of the property;
 - b. there is no reasonable use with less impact on the sensitive area;
 - c. the proposed development does not pose an unreasonable threat to the public health, safety or welfare on or off the development proposal site and is consistent with the general purposes of this chapter in the public interest; and
 - d. Any alternations permitted to the sensitive area shall be the minimum necessary to allow for reasonable use of the property; and any authorized alteration of the sensitive area under the subsection shall be subject to conditions established by the department including, but limited to, mitigation under an approved mitigation plan.”
5. Public Rule 21A-24-022 has been promulgated by DDES to assist in the application of reasonable use exception standards to qualifying properties. Rule 21A-24-022.C contains a “guideline” stating that “if the subject property is a lot of less than 30,000 gross square feet, no more than 3,000 square feet of the site may be disturbed by structure or other land alteration, including but not limited to grading, utility installation, and landscaping, but not including an area used for on-site sewage disposal system.” Subparagraph D of 21A-24-022 allows DDES to “modify the guidelines set forth in subsection C” if an applicant demonstrates that there are “unique circumstances related to the property, including but not limited to, the need to construct a long, narrow driveway in order to obtain primary access to the development site” and such modification results in a use exception that is “the minimum necessary to provide relief to the applicant”.
6. The 3,000 square-foot development limit stated in public rule 21A-24-022.C is advisory and not mandatory. The rule itself states that it is a guideline and allows for its modification in response to unique circumstances. Moreover, the underlying regulatory language contained in KCC 21A.24.070.B.1(d) limits site alterations to “the minimum necessary to allow for reasonable use of the property”. This language requires that each property be evaluated based on its specific characteristics; it does not obviously support or authorize a rigid development limit applicable to entire categories of properties.
7. SeaSpect’s compliance with most of the reasonable use exception standards is not at issue in this proceeding. Any residential construction on the property will require alteration of the wetland itself; therefore a variance cannot be granted. The fact that more than 90% of the parcel is covered by the class 3 wetland demonstrates that strict application of sensitive areas requirements would deny all reasonable use of the property. Since this is a residential application within a residential zone, there is no other type of reasonable use available under the zoning that would have less impact on the sensitive area. Further, there is no suggestion that the reasonable use exception application poses an unreasonable threat to the public health, safety or

welfare, and the only sensitive areas chapter purpose potentially implicated by alteration of a low-function class 3 wetland in this location would be the prevention of cumulative adverse environmental impacts to wetland resources.

8. So the basic questions become whether the SeaSpect development proposal is “the minimum necessary to allow for reasonable use of the property”, whether there are unique circumstances that affect this determination, and to what degree, if any, the character of other development in this waterfront neighborhood should be considered in applying the reasonable use standard. There is very little useful Washington case law discussing the concept of reasonable use. The leading case appears to be *Buechel v. State Department of Ecology*, 125 Wn P.2d 196 (1994). Here the state Supreme Court interpreted an undefined “reasonable use” term in a Mason County variance ordinance. It stated that “the size, location, and physical attributes of a piece of property are relevant when deciding what is a reasonable use of a particular parcel of land” and “to some extent the reasonable use of property depends on the expectations of the land owner at the time of purchase of the property” (125 Wn P.2d at 918). In dealing with owner expectations the court further allowed that “courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is reasonable use of the land” (125 Wn P.2d at 210). The court’s discussion of the facts took note of the actual uses being made of nearby properties.
9. Unlike the Mason County ordinance at issue in *Buechel*, the term “reasonable use” has been defined for zoning code purposes at KCC 21A.06.950 as “a legal concept articulated by federal and state courts in regulatory taking cases”. This is a floating definition to the extent that it is tied to an evolving body of law, but it would seem to at least indicate an intent not to approve a use that exceeds the minimum standards necessary to avoid a taking. If taking cases only require government to permit some economically valuable use of a property, the zoning code definition would preclude major reliance upon neighborhood characteristics to define its scope.
10. Turning to the unique characteristics of this parcel, the site-specific factors that seem to be most important to our review are the fact that the property must be accessed through two neighboring parcels via a long, sloped driveway that requires most guest parking to be on site, necessitates vehicle turnaround capability, and perhaps imposes some fire access requirements. The second major unique circumstance is the history and low functional quality of the class 3 wetland. With the respect to the first factor, the DDES public rule acknowledges that difficulties relating to obtaining primary access can constitute unique circumstances.
11. Any determination of reasonable necessity must require the balancing of an applicant’s legitimate needs with the degree and quality of the sensitive areas impact. The first thing to be noted about class 3 wetlands is that from a regulatory standpoint they occupy the lowest rung of sensitive areas value. In Urban areas a class 3 wetland occupying less than 2,500 square feet is deemed unregulated and can be filled. Moreover wetlands that are not of natural origin are excluded from regulatory protection. KCC 21A.06.1415 states that “wetlands do not include artificial features created from non-wetland areas including, but not limited to irrigation and drainage ditches, grass line swales, canals, detention facilities, wastewater treatment facilities, farm ponds and landscape amenities, or those wetlands created after July 1, 1990 that were unintentionally created as the result of the construction of a road, street, or highway.”
12. While the residence that burned in 1989 provides SeaSpect with no legal precedent as a non-conforming structure, the fact of its prior existence suggests that the current wetland conditions on the property are of relatively recent origin and are caused at least in part by drainage from

other residential development on the hillside above. While this evidence may not unequivocally satisfy the exemption standard for artificial wetland features, it can be regarded as a unique circumstance for purposes of determining a reasonable use exception. The likely artificial source of wetland hydrology for the parcel combined with the absence of significant wetland functions and values merits being taken into account when evaluating the acceptable extent of wetland alteration.

13. Based on the primary access and parking limitations characterizing this property, as well as the low quality urban context and probable artificial origin of the wetland, we conclude that a reasonable use exception for the SeaSpect property should be granted in the full amount of 3,707 feet of impervious coverage as permitted by the zoning regulations. In addition a further 1,000 feet of residential landscaping should be allowed, with the remainder of the property subject to native vegetation plantings pursuant to an approved wetland restoration plan.
14. Although we see no need to discuss it in detail in view of our decision above on the reasonable use exception appeal, a similar outcome could be reached pursuant to KCC 21A.24.075 under the discretionary authority conferred therein to waive sensitive area requirements relating to class 3 wetlands located in the Urban area for up to 5,000 square feet in footprint impact.

DECISION:

The reasonable use exception appeal is GRANTED subject to applicable zoning restrictions for the Holmes Point area as stated in P-suffix condition NS-P23.

ORDER:

The appeal is granted subject to the following conditions:

1. The reasonable use exception is granted for a maximum of 3,707 square feet of impervious area. The Applicant shall revise its building permit site plan to reflect this limitation.
2. In addition to the impervious area footprint a further 1,000 square feet of permeable landscaped yard area shall be permitted. The remainder of the lot area outside of developed areas shall be replanted in native vegetation pursuant to a wetland mitigation plan approved by DDES. The wetland mitigation plan shall also provide for offsite replacement of the wetland areas altered on a 1:1 basis within the eastern shore of Lake Washington watershed, if feasible. The wetland mitigation plan shall also specify the location of proposed yard landscaping and include appropriate limitations on the use of chemical fertilizers and herbicides.

ORDERED this 3rd day of January, 2005.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 3rd day of January, 2005, to the following parties and interested persons of record:

Brian Brand Baylis Architects 10801 Main St. Bellevue WA 98004	Benn Burke Adolfson Associates 5309 Shilshole Ave. NW, #200 Seattle WA 98107	Donna Frostholt 5309 Shilshole Ave. NW Seattle WA 98107
Ikuno Masterson Adolfson Associates 5309 Shilshole Ave. NW, #200 Seattle WA 98107	Barbara McGrath 13871 - 62nd Ave. NE Kirkland WA 98034	Richard Wilson Hillis Clark Martin & Peterson 1221 Second Ave. #500 Seattle WA 98101-2925
Boon Woo SeaSpect, Inc. 11410 NE 124th St., Ste. 125 Kirkland WA 98034	Steve Bottheim DDES/LUSD Site Devel. Services MS OAK-DE-0100	Matt Caskey Project Planner KC DDES/LUSD MS OAK-DE-0100
Lisa Dinsmore DDES/LUSD MS OAK-DE-0100	Shirley Goll DDES/LUSD Current Planning MS OAK-DE-0100	Betsy MacWhinney DDES/LUSD MS OAK-DE-0100
Joe Miles DDES/LUSD MS OAK-DE-0100	Cass Newell KC Prosecuting Attys' Office Civil Division MS KCC-PA-0550	Sherie Sabour DDES/LUSD Current Planning MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision.

MINUTES OF THE DECEMBER 10, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L04SAX04.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Cass Newell, Matt Caskey and Betsy MacWhinney, representing the Department; Richard R. Wilson representing the Appellant; and Ikuno Masterson, Donna Frostholt, Benn Burke and Brian Brand.

The following Exhibits were offered and entered into the record:

Exhibit No. 1 DDES File No. L04SAX04
 Exhibit No. 2 DDES staff report dated August 2004
 Exhibit No. 3 Site plan submitted on December 1, 2004
 Exhibit No. 4a Parcel overview, received by DDES on April 23, 2004
 Exhibit No. 4b Original site plan dated April 23, 2004
 Exhibit No. 5 Final site plan dated May 15, 2000
 Exhibit No. 6 Wetlands delineation report prepared by Adolfson Associates, Inc., dated May 2002,

- received by DDES April 23, 2004
- Exhibit No. 7 Staff photographs (5) taken August 1, 2000
- Exhibit No. 8 Staff photographs (12) taken in 2004
- Exhibit No. 9 Request for Director's Modification or Waiver of SAO Requirements dated October 2002
- Exhibit No. 10 Letter to Joe Miles dated October 21, 2002
- Exhibit No. 11 DDES Modification/Waiver of Sensitive Areas Requirements report and decision dated June 2, 2003
- Exhibit No. 12 Aerial photograph (black & white) taken in 1995
- Exhibit No. 13 DDES Staff Report on L02SAX08 dated December 1, 2003
- Exhibit No. 14 Hearing Examiners report and decision on L02SAX08, dated April 9, 2004
- Exhibit No. 15 Two aerials; Appellant's Property and Kirkland Builders Group Property
- Exhibit No. 16 Assessor's record
- Exhibit No. 17 Variance decision for L01VA021, Alexander V. Abosseine dated March 27, 2002
- Exhibit No. 18 Vicinity map
- Exhibit No. 19 Site plan for L01VA021
- Exhibit No. 20 Letter to Guy Peckham from Tom Fitzpatrick dated November 5, 1999 on P-Suffix
- Exhibit No. 21 Photographs taken by Guy Peckham taken from 1999 – 2000 of the property and surrounding area
- Exhibit No. 22 Letter to Ikuno Masterson from Joe Miles dated November 12, 2002 on the P-Suffix Condition
- Exhibit No. 23 Reasonable Use Exception Application
- Exhibit No. 24 Resume of Donna Frostholt
- Exhibit No. 25 Resume of Benn Burke
- Exhibit No. 26 Recent project list with photos attached prepared by Baylis Architects
- Exhibit No. 27 Assessors data plus map (minus the estimated area column)
- Exhibit No. 28 Resumes of Matthew C. Caskey & Betsy MacWhinney
- Exhibit No. 29 Public Rules, Chapter 21A-24
- Exhibit No. 30 Report and decision on L96RU005, Victor Heimbach, dated August 2, 1996
- Exhibit No. 31 Revised report and decision on L99VA006 & L99VA003, James (Randy) Newell, dated July 3, 2002
- Exhibit No. 32 Report and decision on L03SAX04, Fred & Mervilyn Penwell, dated March 24, 2004